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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CITY OF MESQUITE,

Appellant,

v.

ALADDIN'S CASTLE, INC.,

Appellee.

ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE AMUSEMENT DEVICE MANUFACTURERS ASSOCIATION AS AMICUS CURIAE

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The Amusement Device Manufacturers Association respectfully submits this brief *amicus curiae*. All of the parties to this cause, through their counsel, have consented to this filing; their written consents have been filed with the Clerk pursuant to Rule 36.

INTEREST OF AMICUS

The Amusement Device Manufacturers Association ("ADMA") is a trade association dedicated to promoting the interests of manufacturers of coin-operated amusement games. The Association is presently composed of 13 members: Atari,

Inc., Centuri, Inc., Cinematronics, Inc., D. Gottlieb & Co., Exidy, Inc., Game Plan, Inc., Gremlin Industries, Inc., Rock-Ola Manufacturing Co., Stern Electronics, Inc., Taito America Corp., Universal U. S. A. Inc., U. S. Billiards, Inc. and Williams Electronics, Inc. All of the members of the Association manufacture games that are used exclusively for amusement, like the games Aladdin's Castle, Inc. has installed in its arcade in the shopping mall in the City of Mesquite. Games made by some or all of these companies would probably be installed at that arcade. None of the ADMA members manufactures gambling equipment.

Because of advances in computer technology and micro-electronics, the amusement game industry has moved far beyond the days of the old electro-mechanical pinball machine. Although pinball machines are still popular, the typical coin-operated amusement device of the 1980's is a color television screen coupled to a computer which is programmed to display a series of images, often accompanied by creative sound effects, much like a movie or cartoon. The player pits his or her skill against the computer in maneuvering "players" (such as football players, baseball players, soccer stars, space ships, and cars) to score points or achieve a goal. Most of the games are designed so that they can be played by two or more players, each pitting his or her skill against the other. These games are highly sophisticated and cost several thousand dollars each.

The federal courts have recognized that these video games are useful contributions to the arts and sciences and worthy of copyright protection under the Constitution and copyright law. *See, e.g., Stern Electronics, Inc.* v. *Kaufman*, No. 80 C 3248 (E. D. N. Y. May 22, 1981), *appeal docketed*, No. 81-7411 (2d Cir. June 2, 1981); *Cinematronics, Inc.* v. *K. Noma Enterprise*

Co., No. Civ. 81-439 (D. Ariz. May 22, 1981); *Williams Electronics, Inc.* v. *Artic International, Inc.*, No. 81-1852 (D. N. J. June 24, 1981); *Midway Mfg. Co.* v. *Drikschneider*, No. 81-0-243 (D. Neb. July 15, 1981). Indeed, the United States Army is experimenting with adapting the games to develop hand-eye coordination and image identification among our military. Ludvigsen, *Combat In A Box*, ARMY, Aug. 1981, at 14, 16-19; *Army Considers Video Games To Train, Save*, CHICAGO SUN-TIMES, June 23, 1981 at 18, col. 2.

The ADMA is vitally interested in the outcome of this case because the livelihood of its members depends on the availability of its products to the public. The industry now plays a significant role in the American economy; over the last ten years the production of amusement games has grown so that more than a billion dollars worth of games are produced each year. *See generally* Bernstein, *Atari And The Video-Game Explosion*, FORTUNE, July 27, 1981 at 40. According to one source, "Americans spent $9 billion last year playing coin-operated video and electronic games and only $3 billion going to the movies." WALL STREET J., Aug. 20, 1981, at 1, col. 5. Indeed some of the principal manufacturers of coin-operated games are subsidiaries of major entertainment conglomerates, such as Warner Communications, Inc. (Atari, Inc.), Columbia Pictures Industries, Inc. (D. Gottlieb & Co.) and Gulf + Western Industries, Inc. (Gremlin Industries, Inc.). It is estimated that between 50 and 75 percent of the industry's ultimate customers, the players of the games, are 18 years of age or younger. REPLAY, Aug. 1981 at 25. If municipalities can arbitrarily exclude these citizens from amusement arcades, the industry will be grievously crippled, and young people across the country, particularly those who cannot afford to purchase their own games, will be denied the opportunity to pursue a challenging and creative form of recreation.

ARGUMENT

The Fifth Circuit Court of Appeals and Appellee have cogently demonstrated the constitutional infirmities of the City of Mesquite ordinance before the Court. The ordinance's "connection with criminal elements" language is patently void for vagueness, *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939), and the City's under-17-year-old age ban was applied to Aladdin's in such an arbitrary and capricious manner that it falls under any level of equal protection analysis. *United States Department of Agriculture* v. *Moreno*, 413 U. S. 528, 537-38 (1973); *United States Department of Agriculture* v. *Murry*, 413 U. S. 508, 514 (1973). We will not duplicate that discussion.

Rather, we will focus on the First Amendment rights of businessmen in the amusement industry and their customers and the important Fourteenth Amendment liberty interests of minors to frequent public places and engage in an activity that by no stretch of anyone's imagination is harmful. Further, we shall demonstrate that an under-17-year-old age ban applied to the coin-operated amusement device industry of the 1980's is so irrational and arbitrary as to violate the Equal Protection Clause of the Fourteenth Amendment.

I

THE UNDER 17 YEAR AGE BAN VIOLATES THE FIRST AMENDMENT RIGHTS OF ALADDIN'S AND THE LIBERTY OF ITS CUSTOMERS.

The City of Mesquite's under-17-year-old age ban is not an ordinary economic regulation. Mesquite's ordinance violates important First and Fourteenth Amendment rights in addition to those ably identified by the Fifth Circuit Court of Appeals.

First. The freedom of expression protected by the First Amendment encompasses the right to present entertainment to the public. *Winters* v. *New York*, 333 U. S. 507, 510 (1948). Only last term this Court held that the First Amendment

protects the right of amusement establishments to offer coin-operated devices to customers to view live nude dancing in *Schad* v. *Borough of Mount Ephraim*, 101 S. Ct. 2176 (1981). Like movies, plays, and concerts, such entertainment "is not without its First Amendment protections from official regulation." *Id.* at 2181.

The operation of Aladdin's coin-operated amusement devices is even more entitled to Constitutional protection. The video games of Aladdin's and the ADMA are very similar to movies and, indeed, are receiving copyright protection on the grounds that they *are* movies:

> Stern's video game "Scramble," . . . presents on a screen a series of images projected by a cathode ray tube which depicts a spaceship simultaneously trying to navigate a mountainous airspace, destroy enemy fuel depots, evade deadly ground fire, and prevail in an aerial dogfight, while at the same time watching carefully over a diminishing fuel supply. *In essence, the work is a movie in which the viewer participates in the action as the fearless pilot controlling the spaceship.*

Stern Electronics, Inc. v. *Kaufman*, No. 80 C 3248, slip op. at 7-8 (E. D. N. Y. May 22, 1981) (emphasis supplied), *appeal docketed*, No. 81-7411 (2d Cir. June 2, 1981). *Accord, Cinematronics, Inc.* v. *K. Noma Enterprise Co.*, No. Civ. 81-439 (D. Ariz. May 22, 1981).

Aladdin's customers have a First Amendment right to view the entertainment. *See Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 756-57 (1976) (the right to view expression is reciprocal). Moreover, the rights of Aladdin's customers are even stronger than the rights of the audience in *Schad* because Aladdin's customers, very often in association with other players, are active participants in the drama. And there can be no claim that this

activity, unlike the performance in *Schad*, is unsuitable for the eyes of the young. Rather, as noted above (page 3), the educational benefits and skills acquired from such games are so valuable that the U.S. Department of Defense plans to train members of the armed forces in precisely the type of game exercises covered by the ordinance here under challenge.

Second. The Fourteenth Amendment's liberty guarantee must encompass the right to engage in recreation that is not inherently harmful to the participant and does not interfere with the rights of others. *See Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923). Recreation is self-expression. As one noted expert has recognized:

> Like our vernacular tongues, all games are media of interpersonal communication, and they could have neither existence nor meaning except as extensions of our immediate inner lives. If we take a tennis racket in hand, or thirteen playing cards, we consent to being a part of a dynamic mechanism in an artificially contrived situation. Is this not the reason we enjoy those games most that mimic other situations in our work and social lives? Do not our favorite games provide a release from the monopolistic tyranny of the social machine? In a word, does not Aristotle's idea of drama as a mimetic reenactment and relief from our besetting pressures apply perfectly to all kinds of games and dance and fun? For fun or games to be welcome, they must convey an echo of workaday life. On the other hand, a man or society without games is one sunk in the zombie trance of the automation. Art and games enable us to stand aside from the material pressures of routine and convention, observing and questioning. Games as popular art forms offer to all an immediate means of participation in the full life of a society, such as no single role or job can offer to any man.
>
> * * *
>
> That games are extensions, not of our private but of our social selves, and that they are media of communication, should now be plain.

M. McLuhan, Understanding Media: The Extensions of Man 237-38, 245 (1964).

We believe that the right to assemble and associate with others to play games, whether the game be basketball, baseball, bridge, Skittles, Monopoly or pinball, is necessary for citizens to lead full and meaningful lives. Undeniably such recreation may often be construed as a form of conduct and thus subject to regulation. Also undeniably, it is a form of expression, and the liberty to choose one's recreation should not be abridged by the State absent a substantial and compelling public interest. If Presidents, congressmen and their friends can play golf at Burning Tree Country Club, then there is no principled basis for Government to deny citizens, be they young or old, the right to associate with their friends and play video and pinball games at a shopping mall open to the public.

The "peculiar vulnerability of children" does not lessen these constitutional protections for those under 17 years of age here. Not even the City of Mesquite has dared to argue that playing the amusement games of Aladdin's and the members of the ADMA poses a special moral or physical danger to youth. This is not a case where liquor, illicit drugs, X-rated movies, or material that is obscene to minors is purveyed, and a restriction on the entertainment could arguably be justified. *Ginsberg* v. *New York*, 390 U. S. 629 (1968). This is a case where the amusement games "cannot reasonably be regarded as harmful." *Meyer* v. *Nebraska*, 262 U. S. 390, 400 (1923).

In our society parents, not the State, are vested with the right and responsibility to rear their children. *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972). Playing a computer game is not a "critical choice," such as voting, which requires special solicitude for mature, informed judgment. *Ginsberg* v. *New York*, 390 U. S. 629, 649-50 (1968) (Stewart, J., concurring). That the City of Mesquite allows those under 17 to play amusement games if accompanied by a parent does not save the age restriction. There is no interest in safety (*e.g.*, the hazards of swimming in a pool), and there is no other interest, that can justify this burden on a young person's right to engage in

amusement that is neither harmful to the player nor to the public. There are many parents who would readily allow their children to play Aladdin's games without their personal supervision. To suggest that parents must accompany their children every time the children want to play amusement games is to impose an impossible burden on this form of recreation. Very little baseball would be played if parents were required to accompany their children every time each child wanted to play baseball in a public park.

The First Amendment and the Due Process Clause of the Fourteenth Amendment require that a law that impairs, even incidentally, protected liberties, be narrowly drawn and directly related to a real and substantial state interest. *United States* v. *O'Brien,* 391 U. S. 367, 376-77 (1968). Here, there has not been and cannot be a showing that the age ban discourages or prevents social malefactors from preying upon young people. If the City's real purpose is to curb truancy and other anti-social conduct, it should enforce its compulsory school attendance and drug laws, not put an entertainment center that has done no wrong out of business. *Schneider* v. *State,* 308 U. S. 147, 162-64 (1939). If an arcade is unsafe or unsanitary or creates a nuisance, the city can bring the full force of its health codes, building and zoning codes and other traditional remedies to bear, subject to limitations set forth in *Schad.* Thus, without having to resort to an arbitrary age ban on the playing of amusement games, the city has at its disposal traditional remedies designed to deal with every single objection which the age ban purportedly seeks to cure.

By allowing adults to patronize Aladdin's business, the City of Mesquite recognized, by implication, that the amusement is innocent *per se.* This comports with the nearly universal recognition that today's video and pinball games are innocent games of skill and are not to be confused with the disguised gambling devices of another era. *See, e.g., People* v. *Palazzolo,*

62 Mich. App. 140, 143-44, 233 N. W. 2d 216, 218 (1975); *Cossack* v. *City of Los Angeles*, 11 Cal. 3d 726, 733-34, 114 Cal. Rptr. 460, 465, 523 P. 2d 260, 265 (1974); *State* v. *Bloss*, 62 Hawaii Adv. Sh. No. 6932, 613 P. 2d 354, 361 (1980); King, *The Rise and Decline of Coin-Machine Gambling*, 55 J. CRIM. L. C. & P. S. 199 (1964). As one court recently held,

> [T]he video games which petitioners seek to distribute are games of skill and therefore are not gambling devices. They depend upon eye-hand co-ordination, reflexes, muscular control and above all, concentration. Proper timing in aiming and firing is essential. The eyes and hands of an operator of a video game are in constant motion. The player must continually adapt to instantaneous changes in the position of his laser bases relative to the location of the invader projectiles. The amount of physical skill and energy required to successfully play a video game is enormous.

Wnek Vending & Amusements Co. v. *City of Buffalo*, 107 Misc. 2d 353, 357, 434 N. Y. S. 2d 608, 612-13 (Sup. Ct. 1980).

Finally and signally, the City of Mesquite itself has recognized that the under-17-years age restriction serves no legitimate state interest. When Aladdin's advised the City that it could not operate a profitable center if the age restriction were enforced, the City repealed the ban. Only many months later and *after* Aladdin's had invested tens of thousands of dollars, and prevailed in State court on the vagueness issue, did the City reenact the age ban. (630 F. 2d at 1033-34.) The record is clear that the City did so (knowing that Aladdin's had relied on the repeal as the basis for its investment) to drive Aladdin's out of business, not to address a social problem. *See Schad* v. *Borough of Mount Ephraim*, 101 S. Ct. 2176, 2188 (1981) (Stevens, J. concurring).

In sum, when viewed in the context of this outrageous behavior, the City's purported justifications for the age ban—to prevent truancy and to protect the young from unsavory characters—must be seen for the *ex post facto* excuses they are.

II

THE AGE BAN IS NOT RATIONALLY RELATED TO ANY STATE INTEREST.

Even if the City's under-17-year-old age ban did not impair the First and Fourteenth Amendment rights of Aladdin's and its prospective young patrons, it would fall before traditional "rational basis" equal protection analysis. Constitutional law has gone beyond the *Lochneresque* and *a priori* assumptions of *Murphy* v. *California*, 225 U. S. 623 (1912). The day is long past when this Court will accept conclusive, irrebuttable presumptions that "a harmful tendency is a fact requiring no proof, and incapable of being controverted by . . . testimony." *Murphy*, 225 U. S. at 629. *United States Department of Agriculture* v. *Murry*, 413 U. S. 508, 514 (1973); *Stanley* v. *Illinois*, 405 U. S. 645, 656-57 (1972); *Bell* v. *Burson*, 402 U. S. 535, 541 (1971). This Court, as the Fifth Circuit rightly found, has recognized that Victorian notions of the evils of idleness by themselves can no longer sustain legislation. *Papachristou* v. *City of Jacksonville*, 405 U. S. 156, 164 (1972) (idleness, extolled by poets and essayists, is one of the "unwritten amenities" of life). Indeed, Americans possess "the right . . . to gather . . . for social . . . purposes." *Coates* v. *City of Cincinnati*, 402 U. S. 611, 615 (1971).

Common sense teaches that in today's world there is no basis in fact to attach the *Murphy* stigma of unwholesomeness to amusement centers like Aladdin's. As one New York Court recently observed:

> Today, coin-operated video games are distributed to shopping malls, movie theatres, bowling alleys, roller rinks, pizzerias, and neighborhood grocery stores. Video games, originally introduced in Japan several years ago and mass-marketed in this country for the last 18 months, have recently been adapted for use on television screens for home entertainment. A recent Space Invaders com-

> petition in New York City, sponsored by a reputable manufacturer and distributor of video games, attracted over 4,000 entrants and awarded as the grand prize, not surprisingly, a $2,000 Asteroids table top video game. (*New York Times,* Nov. 9, 1980 p. 24). Thus, the contemporary context in which video games are manufactured, distributed, and operated bears little resemblance to the Buffalo atmosphere in 1952.

Wnek Vending & Amusements Co. v. *City of Buffalo,* 107 Misc. 2d 353, 366, 434 N. Y. S. 2d 608, 617 (Sup. Ct. 1980).

Pinball machines and video games are no different from baseball, bowling and other amusements our young people are encouraged to play. As the Supreme Court of Hawaii held in *State* v. *Bloss,* 62 Hawaii Adv. Sh. No. 6932, 613 P. 2d 354, 361 (1980) in striking down a law, like the one in issue here, which restricted children under 18 from playing amusement games without their parents (emphasis supplied):

> Modern pinball machines do not belong in a statute drafted to regulate the effect of old-style pinball and slot machines, games where skill played no part and chance alone governed the players' scores. *Modern pinball machines are indistinguishable from other skill-related amusement games which minors are allowed to play.* Therefore, while HRS § 445-43 was justified at the time of its enactment in 1945, we must conclude that under the rational-basis test the statute no longer bears a reasonable or substantial relationship to the harm sought to be avoided. Accordingly, we find that HRS § 445-43 as a whole and as interpreted and implemented in this case violates the equal protection of the laws guaranteed by the State and Federal constitutions and is unconstitutional.

See Rollins v. *State,* 354 So. 2d 61, 64 (Fla. 1978) (age restriction for billiard parlors held unconstitutional; no rational basis for distinguishing among games).

A classification that cannot even hope to achieve its stated goals, like the age ban here, is without rational basis and violates the Equal Protection Clause. *Eisenstadt* v. *Baird,* 405

U. S. 438, 447-50 (1972). Since long before Huck Finn and Tom Sawyer, there have been truants, and the City's age ban will not prevent those who cut school from doing so. The age restriction here is not confined to school hours, and applies even during weekends and summer vacations—further evidence of its irrationality.

Nor will the ban stop social undesirables from associating with young people. Mesquite will never be able to achieve such a goal unless it is ready to bar young people unaccompanied by their parents from school yards, fast food establishments, bowling alleys, movie theaters, parks, and, indeed, any public street. It is fundamentally unfair to foreclose Aladdin's business, while allowing other public businesses where the young congregate, including the shopping mall itself, on the speculative fear that others (over whom Aladdin's has no control) may possibly transgress some law.

In sum, putting Aladdin's out of business furthers no state interest. No one would seriously argue that the City of Houston could bar young people from attending baseball games at the Astrodome; yet, baseball games may be attended by truants, and liquor is sold there. Our system of freedom would never approve such a restriction on liberty to enjoy the national pastime. There is no principled basis on which the restriction urged here is any less an invidious discrimination wholly unrelated to any state interest.

CONCLUSION

For the foregoing reasons, we join with Appellee and respectfully submit that the decision of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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